

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

HEIDI DAMSKY

WEDA, LTD

HOMEWOOD PARTNERS, INC.

For Construction Permit for a
New FM Station on Channel 247A
in Homewood, Alabama

) MM Docket No. 90-638
)
) File No. BPH-880816MW
)
) File No. BPH-880816NR
)
) File No. BPH-880816NU
)
)
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FEDERAL COMMUNICATIONS COMMISSION
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To: The Commission

**OPPOSITION TO EMERGENCY
MOTION FOR STAY, PENDENTE LITE**

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Dated: September 18, 1998

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SUMMARY

Heidi Damsky ("Damsky") fails to meet the D.C. Circuit's test for grant of a stay of the effectiveness of the Commission's action in Heidi Damsky, 13 FCC Rcd ____ (FCC 98-202, released August 25, 1998 (the "*Reconsideration Order*"). See Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958).

Damsky has failed to demonstrate any likelihood, much less a substantial one, she will succeed on the merits of her appeal of the denial of her application because she was financially unqualified. Damsky had no basis for certifying her costs of construction and operation. Mission Broadcasting Corp. v. F.C.C., 113 F.3d 254 (D.C. Cir. 1997). Damsky adduced insufficient evidence to demonstrate that she had the requisite funds committed even to her "ballpark" estimate of costs. In fact, Damsky did not have a commitment of funds from her husband to make her financial certification. Damsky failed to meet her burdens of proceeding and proof under the financial qualifications issues specified against her. Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon. den., 5 FCC Rcd 3075 (1990), aff'd, 941 F.2d 1214 (D.C. Cir. 1991); Victorson Group, Inc., 6 FCC Rcd 1697 (Rev. Bd. 1991).

Further, Damsky has demonstrated no irreparable injury. She has an adequate remedy at law in her appeal. HRC's construction and operation of the station is subject to the outcome of Damsky's appeal.

A stay would harm the public interest in receiving radio service. Orion Communications, Ltd. v. F.C.C., 131 F.3d 176, 179 (D.C. Cir. 1997).

Damsky has not even made any argument to show that stay would not harm

HRC, which has already incurred significant expense to complete construction of the station and promptly begin service to the public.

The Commission should promptly deny the Emergency Motion for Stay, Pendente Lite.

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**OPPOSITION TO EMERGENCY
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HOMEWOOD RADIO CO., L.L.C. ("HRC"), pursuant to Section 1.45(b) of the Commission's Rules, 47 C.F.R. § 1.45(b), hereby opposes the "Motion for Stay, Pendente Lite," Heidi Damsky ("Damsky") mailed September 11, 1998 (the "Motion"). Damsky seeks a stay the effectiveness of the Commission's action in Heidi Damsky, 13 FCC Rcd ____ (FCC 98-202, released August 25, 1998 (the "*Reconsideration Order*"), in which the Commission denied reconsideration of its May 6, 1998 grant of HRC's application for a new FM radio station at Homewood, Alabama (the "Station") and the affirmance of the disqualification of Damsky. See Heidi Damsky, 13 FCC Rcd ____ (FCC 98-81, released May 6, 1998) (the "*Memorandum Opinion and Order*"). The *Reconsideration Order* also denied as moot Damsky's "Emergency Motion for Stay," filed June 1, 1998. The Motion fails to meet the strict test for grant of a stay. The Commission should promptly deny the Motion.

I. ARGUMENT

A. The Motion Does Not Meet The Virginia Petroleum Jobbers Test.

1. Damsky cites to Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958) for the standard in determining whether to grant a stay. The Virginia Petroleum Jobbers test is applicable to FCC proceedings. National Cable Television Ass'n v. F.C.C., 479 F.2d 183 (D.C. Cir. 1973). As Damsky has conceded, a party seeking a stay must demonstrate that:

- a. The moving party has a strong likelihood that it will prevail on the merits of its appeal;
- b. The party seeking the stay will be irreparably injured without the stay;
- c. The issuance of the stay will not substantially harm other interested parties; and
- d. The grant of the stay is in the public interest.

Virginia Petroleum Jobbers, *supra*, 259 F.2d at 925. Damsky clearly fails this test, in large measure because she cannot demonstrate any likelihood of success on the merits of her appeal, much less an overwhelming likelihood of one.

B. Damsky Utterly Fails To Demonstrate Any Likelihood Of Success On The Merits Of Her Appeal.

2. Damsky's Motion is premised on her contention that in the *Memorandum Opinion and Order*, the Commission improperly affirmed the Administrative Law Judge's conclusion that Damsky was financially unqualified. Damsky contends that the ALJ's decision was supposedly only a matter of finding that "Damsky had not crossed all of

the required 't's' and dotted all the required 'i's' to establish her financial qualifications." (Motion, p. 3). Damsky contends that the ALJ failed to comply with the standards set forth in Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon. den., 5 FCC Rcd 3075 (1990), aff'd, 941 F.2d 1214 (D.C. Cir. 1991) (Motion, p. 4). She contends that the "most egregious error" was the exclusion of a bank letter issued to Damsky by First Alabama Bank (Damsky Ex. 10, p. 5 (rejected at Tr. 1171) (Motion, p. 7). Damsky's Motion incorrectly presents the state of the record evidence. In addition, she has failed to meet the Northampton standard that she contends forms the basis of her appeal.

3. The ALJ designated both financial qualifications and misrepresentation/lack of candor issues against Damsky.^{1/} Order, FCC 91M-2870, released September 19, 1991. In doing so, he placed both the burden of proceeding and the burden of proof on Damsky. Id.

4. Damsky contends that the Commission misapplied Northampton.

^{1/} Damsky incorrectly contends that the ALJ "did not question Damsky's character." (Motion, p. 3). This a canard that Damsky has repeated in several instances in this case. In fact, the ALJ specifically designated a character issue against Damsky. THE specified the following issues designated against Damsky:

- a. To determine whether [] Damsky is financially qualified to construct and operate the station for three months without revenue.
- b. To determine in light of the above whether [] Damsky has lacked candor and/or made misrepresentations to the Commission in her Application.

Order, FCC 91M-2870, released September 19, 1991. In his Initial Decision, after cataloguing all the evidence for his conclusion that Damsky was financially unqualified under Issue "a", he concluded that it was unnecessary to reach Issue "b", the character issue. Heidi Damsky (Initial Decision), 7 FCC Rcd 5244, 5259 (¶ 183) (Admin. L. J. 1992).

However, as consistently demonstrated by HRC, its predecessors (WEDA, Ltd. and Homewood Partners, Inc.)^{2/} and the Commission, it is evident that it is Damsky that has not properly understood and clearly did not meet her burdens under the Northampton case. Under Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), where the Commission has designated a financial qualification issues, the burdens of proof and proceeding are on the applicant to demonstrate that she is financially qualified. "In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, [she] engaged in serious and reasonable efforts to ascertain predictable construction and operation costs." Northampton Media Associates, *supra*, 4 FCC Rcd at 5519 (¶ 15). The continuing validity of this standard is beyond peradventure. Coast TV, 10 FCC Rcd 2852 (Rev. Bd. 1995), *rev. denied*, 10 FCC Rcd 10623 (1995), *recon. denied*, 11 FCC Rcd 4074 (1996), *aff'd sub nom. Mission Broadcasting Corp. v. F.C.C.*, 113 F.3d 254 (D.C. Cir. 1997). It was precisely this standard that the Commission cited in affirming that Damsky was financially unqualified. *Memorandum Opinion and Order*, p. 10 (¶ 29). Once the ALJ designated the financial qualifications and misrepresentation issues, Damsky had to be able to demonstrate that she was financially qualified when she certified the application.

5. This case is in large measure about Damsky's failures of proceeding and

^{2/} In the Joint Request for Approval of Settlement Agreement, filed September 12, 1998, WEDA and Partners did not, as alleged by Damsky, make a "new attack" on Damsky (Motion, p. 4). They merely renewed and updated with subsequent cases the arguments that they had made to the Commission's Review Board after release of the Initial Decision.

proof. She did not present the type of probative evidence necessary to make her case. Damsky's failure in this case, in addition to failing to demonstrate that she had obtained the requisite commitment of funds to construct and operate her station, *Memorandum Opinion and Order*, p. 12 (¶ 32), was the failure to adduce probative evidence sufficient to meet her burdens of proof and proceeding that she was financially qualified.

6. "Probative evidence" includes something more than the "self-serving, uncorroborated statement of the individual responsible for the certification" that she had adequately estimated costs. Northampton, 4 FCC Rcd at 5519 (¶ 16). See also Aspen FM, Inc., 5 FCC Rcd 3196 (1990). Damsky failed in this regard, both with respect to her estimate of costs, as well as evidence regarding funds to meet her costs. To understand how badly she failed this burden requires a brief restatement of relevant facts.

7. Ms. Damsky filed her application on August 16, 1988. (Tr. 1127). As of that date, Ms. Damsky had no written budget for her Homewood station. (Tr. 265-66, 1127). Even under Northampton, she needed to have more than a "guess." In fact, she merely had a "ballpark" estimate that it would cost around \$300,000.00 to construct the station. (Tr. 269, 1129). She received this "ballpark" estimate from communications counsel and William Benns, her consulting engineer. (Tr. 1122, 1127). Although Ms. Damsky spoke to Mr. Benns they did not discuss costs of specific items of equipment. (Tr. 268, 269-70).^{3/} As of August 1988, Ms. Damsky had no specific

^{3/} Damsky offered a "Reconstructed Budget," (Damsky Ex. 10, p. 2), which was rejected
(continued...)

cost figure for a transmitter. (Tr. 1128). The ALJ found that Damsky had never visited her tower site, and that she did not know if access roads would be necessary or if telephone and power lines would need to be installed. Initial Decision, supra, at 5245. She had no specific cost figure for an antenna. (Tr. 1128). She did not contact equipment suppliers independently. (Tr. 1133). Although Ms. Damsky believed that the proposed equipment would be new equipment, (Tr. 1153), she had "no idea" whence she would purchase equipment for the station. (Tr. 1153).

8. In Victorson Group, Inc., 6 FCC Rcd 1697 (Rev. Bd. 1991), the FCC Review Board affirmed the ALJ's conclusion that an applicant had failed to meet its burden of proceeding to show that its costs were reasonably ascertained when the applicant's general partner offered only "nebulous" testimony of her "general sense" of construction costs. Id. at 1700 (¶ 19). She provided no business plan or contemporaneous cost estimate. Id. The Board concluded that this "plain failure" to adduce evidence about its costs "standing alone" constituted grounds for denial of the application. Id. Damsky provided no more than the applicant in Victorson.

9. The ALJ clearly put Heidi Damsky on notice that the reasonableness of her cost estimates was under scrutiny. (Tr. 152). See also, Order, FCC 91M-2870,

^{3/}(...continued)

by the Presiding Judge. (Tr. 1163, 1172-73). Ms. Damsky knew none of the specific cost items on the "Reconstructed Budget" until 1991 (Tr. 1129), which was not even prepared *until 3 years after the filing of the application*. Accordingly, the ALJ properly rejected it because Damsky was not competent to sponsor the exhibit. Contrary to the assertion by Damsky that opposing counsel could have called him as a witness (Motion, p. 6), Mr. Bennis, who prepared the information in the Reconstructed Budget, should have appeared as a sponsoring witness, given Damsky's burden of proceeding in the case.

released September 19, 1991. Yet she failed to provide any evidence that she knew the costs in 1988 when she certified.

10. Since affirming Northampton, the D.C. Circuit has continued to uphold the disqualification of applicants who "make no serious effort to determine how much money [they] would need." Mission Broadcasting, supra, 113 F.3d at 260. "An applicant cannot certify that 'sufficient net liquid assets are on hand or available from committed sources to construct and operate the requested facilities for three months without revenue' as the FCC Form 301 requires, if it has not determined how much money such an operation would require." Id.

11. On this basis alone, Damsky fails to demonstrate any likelihood of success on the merits of her appeal. Further, her arguments about the financial resources on which she intended to rely are equally flawed. Ms. Damsky did not have any documentary evidence in August 1988 regarding the financial status of her husband and herself. Further, she did not make an attempt to present such evidence at the hearing in 1991. This provided an additional basis for affirming her disqualification. Victorson, supra. The D.C. Circuit has specifically upheld this objective information standard that requires documentation of financial capability at the time of filing. CHM Broadcasting Limited Partnership v. F.C.C., 24 F.3d 1453 (D.C. Cir. 1994).

12. Damsky's claim that she could demonstrate more than \$300,000 in cash and liquid assets (Motion, p. 5) is in error. Even by the "best case" showing, the Damskys had less than \$300,000.00 in liquid assets in August 1988. Although Mr.

Damsky claimed a "net worth" of \$759,000, his June 1, 1998 balance sheet showed liquid assets of only \$119,500 (Damsky Ex. 10, p. 3). The nearly \$500,000 in "other assets" listed in his balance sheet were assets (i) for which no valuations or appraisals were offered and/or (ii) by Martin Damsky's own admission had no public market in 1988 from which a value could be determined (Tr. 1101-04). Furthermore, Mr. Damsky had contingent liabilities in 1988 for between \$700,000 and \$1,000,000 in credit lines for his company, for which he had provided personal guarantees. (Tr. 1117-19).

13. To establish the availability of funds to meet expected costs, an applicant relying on non-liquid assets, such as non-publicly traded stock, must provide substantial and reliable evidence to prove the value of such assets. Central Florida Communications Group, Inc., 8 FCC Rcd 4128, 4130 (¶ 10) (Rev. Bd. 1993) (a case involving close family relationships, such as the Damsky case); see also Roxanne Givens, 5 FCC Rcd 5371 (Rev. Bd. 1990), recon. den., 5 FCC Rcd 2905, rev. den., 6 FCC Rcd 2961 (1991), recon. den., 6 FCC Rcd 6909 (1991); Port Huron Family Radio, Inc., 5 FCC Rcd 4562 (¶ 5) (1990); Northampton Media Associates, supra. Damsky did not provide any current appraisal of the value of her husband's non-marketable stocks. In the absence of proof of marketability or liquidity, stock *per se* does not afford reasonable assurance of the availability of funds. Capital City Community Interests, Inc., 2 FCC Rcd 1984, 1985 (Rev. Bd. 1987). Damsky claimed the availability of her husband's pension plan and Damsky Paper stock value, but did not present any documentary evidence regarding it. Contrast, Armando Garcia, 3 FCC Rcd 1065, 1066 (¶ 11) (Rev. Bd.), rev. denied, 3 FCC Rcd 4767 (1988) (no question about financial

qualifications where applicant relying on availability of spouse's pension plan produced written documentation from the plan showing the value of the plan at the time of certification). Martin Damsky's self-serving testimony does not meet the "probative evidence" standard. Northampton; see also, Janice Fay Surber, 5 FCC Rcd 6155, 6158 (¶ 19) (Rev. Bd. 1990). Further, Damsky did not produce any appraisal of the real estate or other assets upon which she might use to "hypothecate" or "sell" to generate sufficient funds to meet her estimated costs of construction or operation. Central Florida, supra, 8 FCC Rcd at 4130 (¶ 11); Capitol City Broadcasting Co., 8 FCC Rcd 8478 (Rev. Bd. 1993); Port Huron, supra; Donald E. Hilgendorf, 4 FCC Rcd 5004 (Rev. Bd. 1989). Thus, Damsky could not rely on any of those "other assets" and real estate to support the claim of the availability of net liquid assets in excess of \$300,000.

14. Further, as the Commission held in the *Memorandum Opinion and Order*, pp. 11-12, Damsky had no more than a "hypothetical" commitment from her husband to provide funds from personal assets for construction of her station. (Tr. 1109-10; 1112-13).

15. Ms. Damsky did not have any documentary evidence in August 1988 regarding the financial status of her husband and herself. Further, she did not make an attempt to present probative evidence of such status in 1988 and any commitment that might have been made in 1988 by her husband at the hearing in 1991. This contrasts with the situation in Northampton, where the parties on whom reliance was made to provide resources (barely 1/8 the amount that would have been required for Damsky's showing) were themselves principals of the applicant and involved in the

financial certification. Northampton, supra, 4 FCC Rcd at 5518 (¶ 7).^{4/}

16. Finally with respect to the financial qualifications assertions, Damsky's contention that the ALJ improperly excluded the Alabama Bank letter (Motion, p. 7) is without merit. First of all, Damsky testified that she was not relying upon the letter. (Tr. 1144, 1171). Given Damsky's contention up until the hearing that she was relying on personal assets, Damsky would have had to seek to amend her application to substitute reliance on the First Alabama letter, which she did not do. Accordingly, the ALJ properly rejected the letter. (Tr. 1171-72). The Commission has only recently restated that the "principal is long-established that an applicant's evidence at hearing must conform to the proposal contained in the application." Gonzalez Broadcasting, Inc., 12 FCC Rcd 12253, 12259 (1997), aff'd sub nom. Jelks v. F.C.C., 146 F.3d 878 (D.C. Cir. 1998).

17. Damsky thus demonstrably fails the "first prong" of the Virginia Petroleum Jobbers test. Damsky has also cited the on the alternative holding of the D.C. Circuit in Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Damsky claims that the WMATA court "modified the Virginia Petroleum test to provide that even in cases where an appellant is 'less likely than not to prevail on the merits,' a stay can still be issued and should be issued where there are other factors

^{4/} The other principals made "a thorough review of their personal resources." Id., 4 FCC Rcd at 5518 (¶ 7). Further, by their taking an active role in preparing and reviewing the accuracy of the application (including the certification of financial qualifications) before it was filed," the other applicant principals "effectively ratified the certification." Id. In contrast, Mrs. Damsky made no such "thorough review." Mr. Damsky conceded that it was all at best a "hypothetical" exercise for him and he played no active role whatsoever in 1988 in reviewing the basis for the financial certification of his wife's application.

requiring a stay." (Motion, p. 3). Damsky is clearly wrong in her interpretation. Contrary to Damsky's interpretation of the WMATA case is the case itself, where the Court held that a stay could only be granted, even without a showing of mathematical probability that the party will prevail on the merits, provided that the moving party otherwise meets all the other Virginia Petroleum factors not just "other factors", as Damsky would have it (Motion, p. 3). As the Court noted:

An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable harm on the movant.

Washington Metro. Area Transit Comm'n v. Holiday Tours, *supra*, 559 F.2d at 844. In other words, even assuming that Damsky had presented serious questions about the basis for her being found financially unqualified, laws, which she has demonstrably not done, Damsky would have had to meet all three other prongs of the test. And Damsky clearly fails the public interest and irreparable injury tests.

C. Damsky Has Not Demonstrated An Irreparable Injury.

18. Damsky has not demonstrated an irreparable injury. A premise of such relief is the absence of a legal remedy. If Damsky were to prevail in her appeal, the Commission would be obligated to grant relief ordered by the Court. 47 U.S.C. § 402(h). Thus, Damsky cannot show an irreparable injury because she does not lack an adequate legal remedy. See Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985).

19. Damsky cannot claim that the proposed time brokerage agreement

("LMA") between HRC and Cox Radio, Inc. ("Cox") is the basis for any "injury". The Commission was clearly on notice of HRC's intent to enter into such an LMA -- HRC specifically disclosed this in the Joint Request for Approval of Settlement. The Commission did not take issue with the LMA in the *Memorandum Opinion and Order*.^{5/}

20. HRC has begun construction of its station, which it was entitled to do upon the release of the *Memorandum Opinion and Order*. As noted on several occasions by HRC, the authority to build the station arose from that release of the order granting HRC's application, which became effective upon its release. 47 C.F.R. § 1.103(a). The act of issuing a construction permit where the Commission has already granted the application is no more than a ministerial act. Kyles Broadcasting, Ltd., 5 FCC Rcd 5846 (¶ 3) (1990). In any event, in requesting that the Commission issue the permit, HRC has specifically acknowledged to the Commission that any such permit (and therefore, the construction undertaken pursuant to that permit) is conditioned upon the outcome of Damsky's appeal. Furthermore, HRC specifically disclaimed any equities

^{5/} Damsky has repeated in the Motion her erroneous allegation that the LMA between HRC and Cox is merely for "cosmetic" purposes and will not provide sufficient for programming by HRC. (Motion, p. 10). In fact, the LMA will require that HRC receives *at least* two hours of programming per week for production of public interest programming that HRC deems necessary. (See Letter of Intent, dated August 12, 1997, at p. 5, copy of which was included in the Joint Request for Approval of Settlement, filed September 11, 1997). As a matter of law, the Commission has stated that it is not interested in the amount of time that a licensee might broker. Policy Statement on Time Brokerage, 82 FCC 2d 107, 114 (¶ 17) (1980). In fact, the Commission has approved agreements where 100% of the broadcast time would be brokered by the licensee. Gisela Huberman, 6 FCC Rcd 5397 (M. M. Bur. 1991); Brian M. Madden, 6 FCC Rcd 1871 (M. M. Bur. 1991). Further, as noted in the *Reconsideration Order*, Damsky's citation of a newspaper article as "evidence" fails to provide any proof of her contentions.

that might arise from its construction and operation of the Homewood station.^{6/} Thus, Damsky is in error in claiming that she would be prejudiced by a claim of "equities" to HRC for having constructed the Homewood station.

21. Damsky cannot demonstrate an irreparable injury justifying stay of the *Reconsideration Order*. When coupled with her failure to demonstrate irreparable injury, this compels denial of the Motion.

**D. The Public Interest Is Not Served
By Delay Of Service To Homewood.**

22. On the basis of the public interest factor, the equities weigh decisively against granting a stay. The public interest is served by inauguration of the first transmission service licensed to Homewood. This was implicit in the decision to make the allocation more than 10 years ago. 47 U.S.C. § 307(b). Delay in the initiation of service, which would result from a grant of the stay, harms the public interest. The grant of HRC's construction permit, as well as any decision to build the station and begin operation of it, is subject to HRC's assumption of the risk associated with Damsky's appeal. However, that does not diminish the public interest in having additional radio service as soon as possible. The Commission has previously been cautioned about minimizing the importance of service to the public and taking actions that would result in disruption of radio service, even in the context of contested licensing cases. "The provision of service to the public would be long delayed if

^{6/} "HRC would not seek any equities for itself from the Commission as a result of the construction and operation of the Station." See, Letter From Counsel To HRC In Reply To Opposition To Issuance Of Construction Permit, dated July 31, 1998, at p. 3.

successful applicants were required to wait until every last appeal was resolved before beginning to broadcast." Orion Communications, Ltd. v. F.C.C., 131 F.3d 176, 179 (D.C. Cir. 1997). The Commission itself has recognized the importance of providing service even where appeals are pending. The public interest is served by the provision of service to the public, rather than "having ... existing facilities lie fallow." Highlands Broadcasting Co., 9 FCC Rcd 5746, 5747 (1994). See also, David J. Bott and Carese Bott, 9 FCC Rcd 6426, 6427 (1994). Thus, it is evident that the public interest would not be served by the grant of the Stay Request.

E. Damsky Fails To Address The Harm To HRC

23. The final test for grant of a stay is: the issuance of the stay will not substantially harm other interested parties. Virginia Petroleum Jobbers, *supra*, 259 F. 2d at 925. Damsky utterly ignores this prong of the test.

24. HRC has acknowledged that it is building the Homewood station at the risk of the reversal of the *Memorandum Opinion and Order*. That does not mean that there should be no consideration of the harm that stay causes HRC.

25. HRC is building the Station, which it became legally entitled to do when the Commission granted its application. To that end, HRC has already spent or committed considerable money. In order to improve the signal to Homewood, it has filed an application for minor modification of its construction permit. See File No. BMPH-980602II (the "Minor Modification Application"). It should be noted that Damsky did not oppose grant of the Minor Modification Application (although she has opposed expedited action to grant of the permit). However, action on the Minor Modification

Application is being held up by Damsky's meritless pleadings. This damages HRC by delaying completion of construction of the Station and inauguration of service.

26. In furtherance of being able to commence immediately with actual construction and initiation of operations, and given that the facilities for the Station proposed in the Minor Modification Application will be at the same location as presently authorized, HRC has already taken considerable steps to be able to complete construction as soon as possible. Based upon the original grant of its construction permit, HRC has already purchased the transmission equipment for the Station facilities, including the antenna and the longer transmission line needed for the higher position on its antenna tower; indeed, the equipment has already been delivered. HRC has negotiated and entered into a tower site lease with the owners of the antenna tower. HRC has been negotiating with a prospective a General Manager, a person with many years' managerial experience in broadcasting and is trying to identify additional staff for the Station. HRC has contracted, paid for and performed site preparation work, such as reinforcement of the antenna tower base and the pouring of a concrete pad for the Station's transmitter building. HRC has erected the Station's transmitter site building, which is now ready for operation. HRC's studio facilities are ready for operation. Although this effort involves expenditures made at some risk of a reversal or remand of the *Memorandum Opinion and Order* and the *Reconsideration Order* by Damsky's appeal, it harms HRC to delay completion of construction of the Station, especially where Damsky has demonstrated so little likelihood of success on the merits of her appeal.

II. CONCLUSION

There is no basis for concluding that Damsky has any likelihood of success on the merits of her appeal of her being found financially unqualified. On this basis alone, the Commission should promptly deny the Motion for Stay. However, Damsky clearly fails the other prongs of the Virginia Petroleum Jobbers test. The Commission should promptly deny the Motion.

WHEREFORE, in light of the foregoing, HRC requests that the Commission promptly deny Damsky's Motion for Stay, Pendente Lite.

Respectfully submitted,

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Dated: September 18, 1998

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CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law firm of Patton Boggs LLP, do hereby certify that a copy of the foregoing **"OPPOSITION TO EMERGENCY MOTION FOR STAY, PENDENTE LITE"** has been sent via U.S. Mail, First-Class postage prepaid, this 18th day of September, 1998 to the following:

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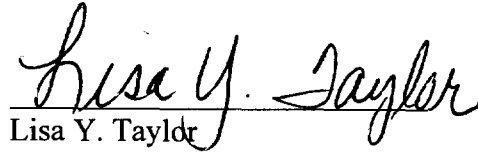
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